DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NATHAN O. BEAL, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, FRY'S FOODS, Respondent Employer, SEDGWICK CLAIMS MGMT, Respondent Carrier.	No. 1 CA-IC 10-0018 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20083-380023

Carrier Claim No. 3008092896-0001

Administrative Law Judge Joseph L. Moore

AWARD AFFIRMED

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P O R T L E Y, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a noncompensable claim. One issue is raised on appeal: whether the administrative law judge ("ALJ") erred by finding that the unexplained fall doctrine did not apply to the petitioner employee's ("claimant's") injury. Because we find the evidence of record supports the ALJ's conclusion that the claimant's injury was the result of an idiopathic fall, we affirm the award.

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rules of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

PROCEDURAL AND FACTUAL HISTORY

¶3 On October 27, 2008, the claimant was working as a stocker on the night shift for the respondent employer, Fry's Foods ("Fry's"). He testified that his injury occurred during his 4:00 a.m. break. The claimant stated that he was standing in the store parking lot with several co-employees when he felt an "extreme wave of dizziness." He testified that his next memory was being loaded into an ambulance. The claimant was treated in a Prescott hospital emergency room for a fractured skull and then was transferred to Phoenix for additional treatment.

¶4 The claimant testified that on the date of injury, he had not done anything unusual and did not believe that he was ill or dehydrated. He stated that he had not experienced any prior episodes of fainting or seizures, and he did not have any health issues. In fact, the claimant had recently spent four years in the military, without any medical complaints.

¶5 Fry's grocery manager testified that he supervised the stockers on the night of the claimant's injury. At 4:00 a.m., he and the stockers took a break together in the store parking lot. At the end of the break, the group turned to walk back to the store, and he heard the claimant hit the pavement. He went back to help the claimant, who was not conscious and was

breathing very shallowly. The manager propped up the claimant's head and had another employee call 911. He stated that the claimant was lying limp on the ground and displayed no seizure activity. The manager stated that prior to this incident, the claimant did not appear to be ill or seem unusual.

¶6 The claimant filed a workers' compensation claim, which was denied. He timely protested the denial, and a hearing was held where testimony was taken from the claimant, his manager, and two physicians.

¶7 Following the hearings, the ALJ entered an award for a noncompensable claim. The claimant timely requested administrative review, but the Award was summarily affirmed. The claimant then appealed.

DISCUSSION

¶8 The claimant has the burden of proving all elements of a compensable claim. *E.g.*, *Toto v. Indus. Comm'n*, 144 Ariz. 508, 512, 698 P.2d 753, 757 (App. 1985). In order to be compensable, an injury must arise out of and in the course of employment. *See* A.R.S. § 23-1021(A) (Supp. 2010). "Arising out of" refers to the origin or cause of the injury, while "in the course of" refers to the time, place, and circumstances of the injury in relation to the employment. *See, e.g., Peter Kiewit Sons' Co. v. Indus. Comm'n,* 88 Ariz. 164, 168, 354 P.2d 28, 30

(1960); *Scheller v. Indus. Comm'n*, 134 Ariz. 418, 420, 656 P.2d 1279, 1281 (App. 1982).

¶9 In this case, the claimant's fall satisfied the time, place, and circumstances of the course of employment element of compensability. In order to meet the arising out of element, the injury must have been the result of some risk of the employment or be incidental to the discharge of the duties.[1] *Royall v. Indus. Comm'n*, 106 Ariz. 346, 349, 476 P.2d 156, 159 (1970). In that regard, the claimant argues that the ALJ erred by failing to apply the unexplained fall doctrine to satisfy the arising out of element.

¶10 Unexplained falls and idiopathic falls are distinct causes of injury. An idiopathic fall arises from some condition personal to the claimant, such as a preexisting physical weakness or disease. *See Larson, supra,* § 9.01[1] at 9-2 to 9-3. It is a personal risk which does not arise out of employment, unless the employment contributes to the risk or aggravates the injury. *Id.*; *Arizona Workers' Compensation*

[1] In employment cases, there are generally four categories of risk: (1) risks distinctly associated with the employment, (2) risks personal to the claimant, (3) neutral risks, and (4) mixed risk, which includes both personal causes and employment related causes. *See* 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §§ 4.02-4.03, at 4-2 to 4-4 (2010). Larson has stated that a neutral risk is "neither distinctly employment related nor distinctly personal." *Larson*, supra, § 4.03, at 4-2 to 4-3. Neutral risks include being struck by lightning, bit by a stray dog, or unexplained falls. *Id.*

Handbook (“*Handbook*”), § 3.3.5, at 3-15 to -16 (Ray J. Davis, et al., eds.; 1992 and Supp. 2010). Idiopathic falls include falls that are the result of a “nonoccupational heart attack, epileptic fit or fainting spell.” *See Larson, supra*, § 9.01[1] at 9-2.

¶11 The claimant, however, argues that the ALJ should have applied the positional-risk doctrine to his fall because it was an unexplained fall.[2] Specifically, the claimant argues that although he fainted, his fall remained unexplained because no evidence established the etiology of the faint. We disagree.

¶12 In *Circle K Store #1131 v. Indus. Comm’n,* 165 Ariz. 91, 796 P.2d 893 (1990), our supreme court first applied the positional-risk doctrine to an unexplained fall. There, the claimant fell after twisting her ankle while taking trash to a dumpster. *Id.* at 92, 796 P.2d at 894. There was no evidence establishing that anything in the vicinity of the dumpster caused her fall, and she did not have a prior history of ankle injuries. *Id.* at 93, 796 P.2d at 895. Our supreme court classified her injury as a “neutral injury, one neither distinctly personal to claimant nor associated with the

[2] The positional-risk doctrine provides that “[a]n injury arises out of employment if it would not have occurred but for the fact that conditions and obligations of the employment placed claimant in the position where he was injured.” *Larson*, *supra*, § 3.05, at 3-6.

employment." *Id.* at 96, 796 P.2d at 898. In such a case, our supreme court held that a claimant's injuries are presumed to arise out of employment. *Id.*

¶13 Unlike *Circle K*, evidence was introduced in this case which established that the claimant's injuries were the result of a distinctly personal cause. Mark Burns, M.D., a board-certified cardiologist with a specialty in electrophysiology, testified that he saw the claimant during his hospital stay. He was told that the claimant was standing outside of work on a break when he experienced a sudden loss of consciousness. Testing performed at the hospital revealed that the claimant's heart was structurally normal, but electrophysiological studies showed that he had a high resting vagal[3] tone, which caused an abnormally low heart rate. The doctor explained that a normal resting heart rate is around sixty beats per minute, but the claimant had a resting heart rate between thirty-five and forty beats per minute. The doctor stated that the claimant's increased vagal tone could definitely play a role in making him more susceptible to vagal syncope.[4] While the doctor agreed that

[3] Related to or mediated by the vagus nerve, i.e., "either of the tenth pair of cranial nerves that arise from the medulla and supply chiefly the viscera esp. with autonomic sensory and motor fibers." Webster's Ninth New Collegiate Dictionary 1301 (1985).
[4] A temporary suspension of consciousness due to a generalized cerebral ischemia; a faint. Dorland's Illustrated Medical Dictionary 1622 (28th ed. 1994).

some speculation was involved in his diagnosis, he stated that the only way to be certain would have been for the claimant to be wearing a heart monitor at the time the episode occurred.[5] The doctor testified that this was very accurate speculation, because testing had ruled out more serious causes. He summarized that it was probably a vagal tone reaction that caused the claimant's loss of consciousness.

¶14 Leo Kahn, M.D., a board-certified neurologist, testified regarding his independent medical examination of the claimant. He received a history of the claimant being on a break at work when he felt a wave of dizziness and experienced a loss of consciousness. Dr. Kahn had reviewed the claimant's industrially-related medical records and the Fry's parking lot surveillance videotape. The videotape showed the claimant falling backwards and striking his head on the pavement. Dr. Kahn testified that the claimant sustained a fracture to the rear portion of his skull and frontal lobe hematoma. It was his opinion that the claimant had experienced a vasodepressor syncope which he described:

[5] This court has recognized that positive knowledge of causation is not always possible, but such uncertainty will not prevent a physician from stating a legally sufficient opinion. *Harbor Ins. Co. v. Indus. Comm'n*, 25 Ariz. App. 610, 612, 545 P.2d 458, 460 (1976).

> In other words, he had heightened vagal tone, and vagal tone is associated with decreased blood pressure, decreased heart rate. And if the blood pressure becomes low enough and the heart rate becomes low enough, a person will pass out. And that's true, what's also known as, syncope, which is just a decreased blood flow to the brain and somebody passes out from that. But it's the increase in the — It's the increase in the parasympathetics of the body such that everything slows down, and basically what you're doing is you're turning off the power supply to the brain.

The doctor agreed that his diagnosis involved some degree of speculation, but he stated that it was minimal in combination with the claimant's history and medical knowledge.

¶15 At oral argument, the claimant asserted that a heightened vagal tone was not a preexisting condition and, instead, was a normal reflex to various environmental factors. Although Dr. Kahn testified that "in certain individuals we have no idea why they [faint]," he further stated that "if you look at the cardiac workup that was done, [the claimant] was noted to have a heart rate in the 40s and 50s at the time. And when you get into the 40s, that's still slow even for a highly-trained athlete. . . . That is slow. So it tells you that he at times has increased vagal tone." Dr. Burns similarly stated that a heightened vagal tone was a "reflex that all of us can have" but some people have "a sensitivity to this reflex." He further stated that the claimant did not have "an abnormal reflex. . . .

[J]ust an abnormal susceptibility to this reflex." The ALJ, therefore, did not err in concluding that the claimant's heightened vagal tone was distinctly personal.

¶16 Moreover, there was no evidence establishing that the employer contributed to causing the claimant's syncope. In *Murphy v. Industrial Commission of Arizona*, our supreme court recognized that a faint may "arise out of employment." 160 Ariz. 482, 486, 774 P.2d 221, 225 (1989). There, the claimant was told that he would receive a one-third pay cut and be transferred to a new position. *Id*. at 483, 774 P.2d at 222. He fainted, fell to the ground, and struck his head on the tile floor. *Id*. The supreme court stated:

> Murphy's physical injury resulted from work-related stress and, we believe, arose out of his employment. It is ironic that had Murphy tripped and fallen on the hard floor during work or had hit some machinery on the way down there would be little question that the accident arose out of and in the course of his employment. We do not believe, however, that falling to a floor as opposed to falling on a piece of machinery should make any difference.

Id. at 486, 774 P.2d at 225.

¶17 Here, however, when asked if there was "anything about [the claimant's] work for Fry's that evening that caused or contributed to this vaso motor response," Dr. Kahn stated "[n]ot based on the history or what I witnessed on the video." In

fact, based on the testimony, the ALJ found that "to a reasonable degree of medical probability, there was no work place factor that caused or contributed to [the claimant's] vasodepressive syncope."

¶18 Substantial evidence supported the ALJ's finding that the cause of the claimant's faint was distinctly personal, and that his injury was not affected by his employment. The ALJ, therefore, did not err.

CONCLUSION

¶19 For all of the foregoing reasons, we affirm the award.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge